

Thursday, May 4, 2000, at 2 p.m., in Dirksen 226.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUBCOMMITTEE ON NEAR EASTERN AND SOUTH ASIAN AFFAIRS

Mr. INHOFE. Mr. President, I ask unanimous consent that the Subcommittee on Near Eastern and South Asian Affairs of the Committee on Foreign Relations be authorized to meet during the session of the Senate on Thursday, May 4, 2000, at 10 a.m. to hold a hearing.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, RESTRUCTURING AND THE DISTRICT OF COLUMBIA

Mr. INHOFE. Mr. President, I ask unanimous consent that the Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia be authorized to meet on Thursday, May 4, 2000, at 10 a.m. for a hearing entitled "Has Government Been 'Reinvented'?"

The PRESIDING OFFICER. Without objection, it is so ordered.

SUBCOMMITTEE ON PRODUCTION AND PRICE COMPETITIVENESS

Mr. INHOFE. Mr. President, I ask unanimous consent that the Subcommittee on Production and Price Competitiveness of the Committee on Agriculture, Nutrition, and Forestry be authorized to meet during the session of the Senate on Thursday, May 4, 2000, at 2 p.m., in SR-332, to conduct a subcommittee hearing on carbon cycle research and agriculture's role in reducing climate change.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROPOSED "REMEDIES" IN THE MICROSOFT ANTITRUST CASE

Mr. GORTON. Mr. President, I would like to take a few minutes to talk about the proposed remedies submitted last Friday by the U.S. Department of Justice and 17 States in the antitrust suit against Microsoft. As my colleagues know, the Department of Justice and the States have asked the court to break Microsoft into two separate companies, and to require significant Government regulation of the two companies.

Let's begin by reviewing the charges in the case. First, the Government has alleged that Microsoft entered into a series of agreements with software developers, Internet Service Providers, Internet content providers, and online services like AOL, that foreclosed Netscape's ability to distribute its Web browsing software. Despite claims by Government lawyers and outside commentators that this was the strongest part of the Government's case, the trial court—even Judge Jackson—disagreed. The court ruled that Microsoft's agreements did not deprive

Netscape of the ability to reach PC users. Indeed, the trial court pointed out the many ways in which Netscape could, and did, distribute Navigator. Direct evidence of this broad distribution can be found in the fact that the installed base of Navigator users increased from 15 million in 1996 to 33 million in late 1998—the very period in which the Government contends that Microsoft foreclosed Netscape's distribution.

The second charge involves what the Government alleged was the unlawful "tying" of Internet Explorer to Windows. The Government argued that this "tying" was one of the primary means by which Microsoft foreclosed Netscape's ability to distribute Navigator. The trial court agreed with the Government, finding that Microsoft violated Section 1 of the Sherman Act in its design of Windows 95 and 98. The court's conclusion is astounding in two respects. First, as I mentioned, the trial court determined that Microsoft had not deprived Netscape of distribution opportunities. Second, and even more important, the trial court's conclusion is in direct contradiction to that of the District of Columbia Circuit Court of Appeals. In June, 1998—before the antitrust trial even began—that court of appeals rejected the charge that the inclusion of Internet Explorer in Windows 95 was wrongful. In its June, 1998 decision, the appeals court stated that "new products integrating functionalities in a useful way should be considered single products regardless of market structure." Despite the fact that trial courts are obliged to follow the rulings of appellate courts, the trial court in the Microsoft case has singularly failed to do so.

In its third charge, the Government alleged that Microsoft held a monopoly in Intel-compatible PC operating systems, and maintained that monopoly through anticompetitive tactics. The trial court agreed, and determined that there were three anticompetitive tools employed by Microsoft: (1) the series of agreements that the trial court itself held did not violate antitrust law; (2) the inclusion of Internet Explorer in Windows, which the Appellate Court already determined was not illegal; and (3) a random assortment of acts involving Microsoft's discussions with other firms, such as Apple and Intel—none of which led to agreements. In relying on these three factors, the trial court seems to have concluded that, while Microsoft's actions, taken individually, might not constitute violations of antitrust law, the combination of these lawful acts constitutes a violation of law. This approach to antitrust liability has generally been rejected by courts, in part because it fails to provide guidance allowing businesses to understand their legal obligations. Such a rule effectively chills desirable competitive conduct.

Finally, the trial court agreed with the Government's allegation that Microsoft unlawfully attempted to monopolize the market for Web browsing software. This conclusion is directly at odds with the court's own previous finding. In the findings of fact released in November of last year, the trial court found that Microsoft's conduct with respect to Netscape was aimed at preventing Netscape from dominating Web browsing software—not at gaining a monopoly for Microsoft. Under antitrust law, a firm cannot be found liable for attempted monopolization unless it specifically intends to monopolize the market. Seeking to prevent somebody else from acquiring a monopoly is not attempted monopolization.

To summarize, one of the Government's charges was dismissed by the trial court; another flouts a specific decision of the appellate court; and the remaining two simply provide no legal basis as antitrust violations. I am highly confident that the appeals court will once again recognize the fundamental flaws in the trial court's decision and find in favor of Microsoft.

In the meantime, however, let's examine the "remedy" proposed by the Department of Justice and 17 States for these fictional violations. First, and most obvious, is the Government's proposal to break Microsoft into two separate companies. Under the Government plan, Windows would be retained by the new "Operating Systems Business," while the remainder of Microsoft, including its office family of products on its Internet properties, would be moved into a new "Application Business." The Department of Justice plan effectively prohibits these two companies from working together for a period of 10 years and effectively freezes fundamental components of the operating system from improvement, thereby crippling in this fast-moving world of technology the very technology which is one of the principal bases of our present prosperity.

As outrageous as the proposal to break up Microsoft is, the heavyhanded regulations the Government proposes to impose on Microsoft are at least as outrageous.

Mr. President, at this point I ask unanimous consent that an article by Declan McCullagh, published in the April 29, 2000, edition of *Wired News* be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

GOVERNMENT WANTS CONTROL OF MS
(By Declan McCullagh)

Bellevue, WA—If Bill Gates was unhappy with early reports of the government's antitrust punishments, he's going to be plenty steamed when he reads the fine print this weekend.

In two lengthy filings on Friday, government attorneys said they eventually hope to carve up Microsoft into two huge chunks. But until that happens, their 40KB proposal

would impose extraordinarily strict government regulations on what the world's largest software company may and may not do.

For instance: Microsoft wouldn't be able to sell computer makers discounted copies of Windows, except for foreign language translations, but would be ordered to open a "secure" lab where other firms may examine the previously internal Windows specifications. Microsoft wouldn't be able to give discounts to hardware or software developers in exchange for promoting or distributing other company products. For instance, Microsoft would be banned from inking a discount deal with CompUSA to bundle a copy of Microsoft Flight Simulator with a Microsoft joystick.

Microsoft would have to create a new executive position and a new committee on its board of directors. The "chief compliance officer" would report to the chief executive officer and oversee a staff devoted to ensuring compliance with the new government rules. If Microsoft hoped to start discarding old emails after its bad experiences during the trial, it wouldn't be able to do so. "Microsoft shall, with the supervision of the chief compliance officer, maintain for a period of at least four years the email of all Microsoft officers, directors and managers engaged in software development, marketing, sales, and developer relations related to platform software," the government's proposed regulations say.

Microsoft would have to monitor all changes it makes to all versions of Windows and track any alternations that would slow down or "degrade the performance of" any third-party application such as Internet browsers, email client software, multimedia viewing software, instant messaging software, and voice recognition software. If it does not notify the third-party developer, criminal sanctions would apply.

State and federal government lawyers could come onto Microsoft's campus here "during office hours" to "inspect and copy" any relevant document, email message, collection of source code or other related information.

The same state and federal government lawyers would be allowed to question any Microsoft employee "without restraint or interference."

Mr. GORTON. Mr. President, Mr. McCullagh did an excellent job of outlining these extraordinary regulations. I will highlight a few.

Under the Department of Justice proposal, the Government would require Microsoft to create an entirely new executive position, as well as a new committee on its corporate board of directors, the function of which would be to ensure the company's compliance with the Government's new regulations.

The Department of Justice would require Microsoft to "maintain for a period of at least 4 years the e-mail of all Microsoft officers, directors, and managers engaged in software development, marketing, sales, and developer relations related to Platform Software."

Under the proposed remedy, Microsoft would also be required to give the Government "access during office hours" to inspect and demand copies of all "books, ledgers, accounts, correspondence, memoranda, source code, and other records and documents in the possession or under the control of

Microsoft" relating to the matters contained in the final judgment. Not only that, the Government, "without restraint or interference" from Microsoft, could demand to question any officers, employees, or agents of the company.

Together with the other sanctions, these proposals would guarantee that every Microsoft competitor would know everything the two Microsofts plan long before the plans became reality. Mr. President, that is a death sentence.

The function of relief in an antitrust case is to enjoin the conduct found to be anticompetitive and to enhance competition. Any objective review of the "remedies" proposed by the Department of Justice and States, however, can only lead to the conclusion that the Government is not seeking relief from anticompetitive behavior but to punish Microsoft with unwarranted sanctions for allegations by threatening its very existence.

There is no question that the Department of Justice initiated this antitrust action at the behest of Microsoft's competitors. Those competitors have said they sought Government intervention because it would be "too expensive" to pursue private litigation. This unjustified case has been too expensive—way too expensive—but not in the way the competitors envisioned. In the 10 days following the breakdown of settlement talks, there was a \$1.7 trillion loss in market capitalization. The damages from that huge loss were not limited to Microsoft—a broad range of companies, including many of Microsoft's competitors, were affected. More importantly, so, too, were millions of American investors.

As one would expect, the millions of Americans who hold Microsoft shares have taken a bath in recent weeks. The day after the trial court issued its "Findings of Law" on April 3, Microsoft stockholders lost \$80 billion in assets. The decline in Microsoft stock helped fuel a 349-point slide in the NASDAQ, the biggest 1-day drop in the history of the exchange. The pain wasn't limited to individual Microsoft shareholders, however. At least 2,000 mutual funds and countless pension funds include Microsoft shares.

I find it curious that the Vice President of the United States criticizes as the "risky scheme" tax proposals in this body that would reduce taxes by \$12 billion in 1 year and \$150 billion in 5 years. Yet the very administration that he supports has caused a loss in the pockets of very real American citizens of far in excess of that amount.

The "risky scheme" is the Microsoft lawsuit and we have now suffered damages from that risk. It is unfortunate that those who were so anxious to bring the heavy hand of Government into this incredibly innovative and successful industry didn't listen to some

of the more cautious voices, such as that of Dr. Milton Friedman, who warned early on to be careful what you wish. Dr. Friedman recently reinforced that sentiment in a statement to the National Taxpayers Union:

Recent events dealing with the Microsoft suit certainly support the view I expressed a year ago—that Silicon Valley is suicidal in calling Government in to mediate in the disputes among some of the big companies in the area of Microsoft. The money that has been spent on legal maneuvers would have been much more usefully spent on research in technology. The loss of the time spent in the courts by highly trained and skilled lawyers could certainly have been spent more fruitfully. Overall, the major effect has been a decline in the capital value of the computer industry, Microsoft in particular, but its competitors as well. They must rue the day they set this incredible episode in operation.

One of the biggest tragedies of this case is that it has all been done in the name of consumer benefit. So far, the only real harm to consumers I have seen has come from the resources wasted on the case itself and from the market convulsions that resulted from the mere specter of the Government's punitive relief proposal.

DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE

Mr. GORTON. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 504, S. 2370.

The PRESIDING OFFICER. The clerk will report the bill by title.

The assistant legislative clerk read as follows:

A bill (S. 2370) to designate the Federal building located at 500 Pearl Street in New York City, New York, as the "Daniel Patrick Moynihan United States Courthouse."

There being no objection, the Senate proceeded to consider the bill.

Mr. SMITH of New Hampshire. Mr. President, as chairman of the Environment and Public Works Committee, I was very proud to report out just a couple weeks ago a bill to designate the federal building at 500 Pearl Street in New York City, New York, as the "Daniel Patrick Moynihan United States Courthouse." When I first joined this committee, the chairman's seat was occupied by the Senator from New York. His generosity and kindness in helping me, a freshman Senator from the other side of the aisle, is something I will always remember and for which I will be forever grateful. I have since come to rely on his advice, counsel and wisdom on issues ranging from transportation to Superfund, as have so many of my colleagues.

Our friend, Senator DANIEL PATRICK MOYNIHAN, is someone who has served this nation with great integrity and true patriotism. He is the only person in our nation's history to serve in four successive administrations as a member of the Cabinet or sub-Cabinet. He